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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of: SCOTT KASSA, Petitioner/Appellant/ Cross-Appellee, and KAZUMI KASSA, Respondent/Appellee/ Cross-Appellant.	2 CA-CV 2007-0021 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20040576

Honorable David R. Ostapuk, Judge Pro Tempore

AFFIRMED

Scott Kassa
Vail
In Propria Persona

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By Jennifer N. Manzi
Tucson
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Appellee/Cross-Appellant

V Á S Q U E Z, Judge.

¶1 In this domestic relations action, cross-appellant Kazumi Kassa appeals from the decree of dissolution of her marriage to cross-appellee Scott Kassa. For the following reasons, we affirm.

Facts and Procedural Background

¶2 We view the record in the light most favorable to upholding the trial court's decision. *Little v. Little*, 193 Ariz. 518, ¶ 5, 975 P.2d 108, 110 (1999). Kazumi and Scott Kassa were married in 1995. The couple's primary residence for most of their marriage was a house on Avenida Elena in Tucson that Scott had purchased some years before the two were married. Scott filed for divorce in February 2004, and the marriage was dissolved in December 2006, after a three-day trial. In its decree of dissolution, the trial court granted the couple joint legal custody of their two minor children and ordered Scott to pay spousal maintenance for five years.

¶3 Scott filed a timely appeal, and Kazumi filed a timely cross-appeal. However, this court dismissed Scott's appeal after he failed to timely file an opening brief. In her cross-appeal, Kazumi argues the trial court erred in calculating the community interest in the Avenida Elena property, awarding joint legal custody of their minor children, and setting the amount and duration of spousal maintenance.

Discussion

Community interest in separate property

¶4 Kazumi does not dispute that Scott owned the Avenida Elena property before marriage and that it is his separate property. *See* A.R.S. § 25-213(A) (property owned by spouse prior to marriage is separate property of that spouse). But she contends the trial court erred in calculating the community interest in the property by using the formula set out in *Drahos v. Rens*, 149 Ariz. 248, 250, 717 P.2d 927, 929 (App. 1985). In *Drahos*, this court noted that "a residence which is separate property does not change its character because it is used as a family home and mortgage payments are made from community funds." *Id.* at 249, 717 P.2d at 928. However, "[t]he community, which contributed capital to the separate property, is nevertheless entitled to some form of compensation." *Id.*

¶5 In *Honnas v. Honnas*, 133 Ariz. 39, 41, 648 P.2d 1045, 1047 (1982), our supreme court reaffirmed the validity of the "value-at-dissolution" formula for determining a community interest in separate property in cases involving real property. There, the court held that, when community funds are "used for the benefit of the separate property, . . . the community is entitled to share in the enhanced value of the property due to the expenditure of funds." *Id.* at 40, 648 P.2d at 1046. In *Drahos*, relying on the "expansive" language in *Honnas*, we held "the value-at-dissolution formula applies when community funds are used to benefit but not necessarily improve separate property." *Drahos*, 149 Ariz. at 250, 717 P.2d at 929.

¶6 Here, the trial court rejected the parties' conflicting estimates of the enhanced current value of the property and instead found the property had increased in value by approximately $75,000 over the course of the marriage. A new kitchen and dining room extension had been added to the home during the marriage at a cost of approximately $75,000, and the parties had also made mortgage payments totaling $7,000. But, in calculating the community's share of the enhanced value pursuant to *Drahos*, the court recognized the $7,000 mortgage payments as the only community contribution to the property. *See id.*

¶7 Kazumi asserts the community had also contributed "the $75,000 worth of improvements made on the property" and thus should have been credited with "the entire $75,000 increase in value" rather than a share based on the mortgage payments.[1] But this assertion is not supported by the record. Scott gave uncontradicted testimony that the improvements were funded by a home equity line of credit, which was his separate debt, secured by his separate property.[2] *See Potthoff v. Potthoff*, 128 Ariz. 557, 564, 627 P.2d 708, 715 (App. 1981) (improvements not made with community credit where loan

[1]The record also indicates additional improvements of approximately $10,000 were made using community funds. However, the court did not include these expenditures in its calculation either of the property's increased value or of the community's interest. Because Kazumi does not raise the issue of these expenditures on appeal, we do not consider it. *See Carrillo v. State*, 169 Ariz. 126, 132, 817 P.2d 493, 499 (App. 1991) ("Issues not clearly raised and argued on appeal are waived.").

[2]Indeed, Kazumi signed a deed disclaiming any interest in the Avenida Elena property at the time Scott signed for the loan. And the balance of Scott's debt on the loan at the time he filed the petition for dissolution more than offset the increase in the property's value.

ultimately secured by husband's separate property). Thus, the court did not err in failing to include the $75,000 cost of the improvements in calculating the enhanced value of the property attributable to the expenditure of community funds. *See Drahos*, 149 Ariz. at 250, 717 P.2d at 929 (articulating proper formula "when community funds are used to benefit but not necessarily improve separate property").

Joint legal custody and duration of spousal maintenance

¶8 Kazumi also argues the court erred in granting joint legal custody of the children and in awarding spousal maintenance for only five years. The court's ruling on the custody issue was based in part on its finding that "both parties have recommended joint legal custody." On appeal, Kazumi contends she had in fact "argued for sole custody of the children, and thus the trial court's ultimate finding on the issue of custody was heavily influenced by a falsity." Although Kazumi's testimony on this issue was less than clear,[3] she unequivocally requested joint legal custody in her written closing argument.

¶9 Similarly, although she now argues on appeal that she "will require more than five years of spousal maintenance," she only requested an award of maintenance for five years in both her testimony at trial and her closing argument.[4] "[O]ne who deliberately leads

[3]Specifically, it was unclear whether Kazumi was referring to legal custody or physical custody when she stated that joint custody was "very hard for children" and that she would "like to get . . . full custody."

[4]Kazumi fails to cite any part of the record other than the trial court's April 2006 under advisement ruling. Most notably, she cites neither the December 2006 decree of dissolution—which, although based on the April 2006 ruling, incorporates different amounts for child support and spousal maintenance—nor the transcripts from three days of trial

the court to take certain action may not upon appeal assign that action as error." *Schlecht v. Schiel*, 76 Ariz. 214, 220, 262 P.2d 252, 256 (1953). Kazumi has therefore waived these issues on appeal.

Substantiation of income

¶10 Citing *In re Marriage of Hinkston*, 133 Ariz. 592, 594, 653 P.2d 49, 51 (App. 1982), Kazumi argues the court erred by "not requir[ing Scott] to substantiate his income." She contends "the trial court did not have substantial knowledge of his financial resources and therefore did not have support in the record for its spousal maintenance determination."[5] "Although the trial court is vested with broad discretion when determining [the] . . . need for maintenance, there still must be some support in the record for the court's determination." *Id.* However, Kazumi cites no authority for her contention that, because "it is entirely possible that [Scott]'s monthly income . . . fluctuated" in the period between the court's temporary ruling in June 2005 and its April 2006 ruling, the court was required, sua sponte, to order Scott to substantiate his income. In any event, Scott submitted a financial affidavit to the court in December 2005 and testified about his current income at

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testimony, nor the parties' written closing arguments. It is thus unclear whether appellate counsel has knowingly ignored critical facts from the proceedings below or has merely failed to familiarize herself adequately with the record.

[5]Kazumi cites the amount of spousal maintenance ordered by the court's April 2006 ruling. However, the court corrected this amount before the decree of dissolution was entered in December 2006, recognizing that the April ruling "inadvertently reflected the first orders entered and not the most recent orders entered prior to trial."

trial in March 2006. There was thus sufficient evidence to support the court's determination regarding spousal maintenance. *See id.*

Disposition

¶11 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge